

QUINN EMANUEL URQUHART & SULLIVAN, LLP

James R. Asperger (Bar No. 83188)

jamesasperger@quinnemanuel.com

865 S. Figueroa St., 10th Floor

Los Angeles, California 90017

Telephone: (213) 443-3000

Facsimile: (213) 443-3100

Kevin P.B. Johnson (Bar No. 177129)

kevinjohnson@quinnemanuel.com

Ray R. Zado (Bar No. 208501)

rayzado@quinnemanuel.com

555 Twin Dolphin Drive, 5th Floor

Redwood Shores, California 94065-2139

Telephone: (650) 801-5000

Facsimile: (650) 801-5100

Attorneys for Plaintiff BLACKBERRY LIMITED

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

BLACKBERRY LIMITED, a Canadian
corporation,

Plaintiff,

vs.

TYPO PRODUCTS LLC, a Nevada limited
liability company,

Defendant.

Case No. 3:14-cv-00023-WHO

**BLACKBERRY LIMITED'S REPLY IN
SUPPORT OF ITS MOTION FOR A
PRELIMINARY INJUNCTION**

Date: March 19, 2014

Time: 2:00 p.m.

Place: Courtroom 2, 17th Floor

Judge: Hon. William H. Orrick, III

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. TYPO RAISES NO SUBSTANTIAL ISSUE OF INVALIDITY OF THE ‘964 PATENT	1
A. The ‘964 Patent Is Not Obvious.....	2
B. The ‘964 Patent is Not Invalid Under 35 U.S.C. § 112	5
III. THE ACCUSED TYPO KEYBOARD INFRINGES THE ‘964 PATENT	6
A. Typo’s Proposed Constructions Are Incorrect.....	7
B. Even Under Typo’s Proposed Constructions, the Typo Keyboard Infringes	8
IV. TYPO RAISES NO SUBSTANTIAL ISSUE OF INVALIDITY OF THE D’775 PATENT	8
A. The D’775 Patent Is Not Anticipated.....	8
B. The D’775 Is Not Obvious.....	9
V. THE ACCUSED TYPO KEYBOARD INFRINGES THE D’775 PATENT	11
A. Typo’s Proposed Verbal Claim Construction is Improper	11
B. No Elements of the D’775 Patent Are Dictated by Function.....	11
C. BlackBerry Has Proven Infringement of the D’775 Patent	12
VI. AN IMMEDIATE INJUNCTION IS NEEDED TO PREVENT IRREPARABLE HARM.....	13
A. Typo Failed to Rebut BlackBerry’s Evidence Of Irreparable Harm	13
B. The Balance of Equities Favors BlackBerry.....	15
C. A Preliminary Injunction Serves the Public Interest.....	15
VII. CONCLUSION.....	15

TABLE OF AUTHORITIES**Page****Cases**

<i>Apple, Inc. v. Samsung Elecs. Co., Ltd.</i> , 678 F.3d 1314 (Fed. Cir. 2012).....	10
<i>Apple, Inc. v. Samsung Electronics Co., Ltd.</i> , No. 11-CV-01846-LHK.....	1
<i>Best Lock Corp. v. Ilco Unican Corp.</i> , 94 F.3d 1563 (Fed. Cir. 1996).....	12
<i>Bose Corp. v. JBL, Inc.</i> , 274 F.3d 1354 (Fed. Cir 2001).....	6
<i>Braun Inc. v. Dynamics Corp. Of Am.</i> 975 F.2d 815 (Fed. Cir. 1992).....	13
<i>Cadence Design Sys., Inc. v. Avant Corp.</i> , 125 F.3d 824 (9th Cir. 1997)	15
<i>Canon Computer Sys., Inc. v. Nu-Kote Int'l, Inc.</i> , 134 F.3d 1085 (Fed. Cir. 2001).....	1
<i>Clamp-Swing Pricing Co. v. Super Market Merchandising and Supply, Inc.</i> , No. 13-cv-04515-WHO, 2013 WL 6199155 (N.D. Cal. Nov. 21, 2013)	14
<i>Contessa Food Prods., Inc. v. Conagra</i> , 282 F.3d 1370 (Fed. Cir. at 2012).....	10, 12
<i>Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579 (1993).....	1
<i>Durling v. Spectrum Furniture Co., Inc.</i> , 101 F.3d 100 (Fed. Cir. 1996).....	9, 10
<i>eBay, Inc. v. Bidder's Edge, Inc.</i> , 100 F. Supp. 2d 1058 (N.D. Cal. 2000)	15
<i>Egyptian Goddess, Inc. v. Swisa, Inc.</i> , 543 F.3d 665 (Fed. Cir. 2008).....	11, 12
<i>Electromotive Div. of Gen. Motors Corp. v. Transp. Sys. Div. of Gen. Elec. Co.</i> , 275 F. Supp. 2d 850 (E.D. Mich. 2003).....	13
<i>Eli Lilly and Co. v. Zenith Goldline Pharm., Inc.</i> , 471 F.3d 1369 (Fed. Cir. 2006).....	2, 3
<i>Energizer Holdings Inc. v. Int'l Trade Comm'n</i> , 435 F.3d 1366 (Fed. Cir. 2006).....	6
<i>Graham v. John Deere Co.</i> , 383 U.S. 1 (1966).....	5

1	<i>In re Harvey</i> ,	
	12 F.3d 1061 (Fed. Cir. 1993).....	9
2	<i>Int'l Seaway Trading Corp.</i> ,	
3	589 F.3d 1233 (Fed. Cir. 2009).....	9, 10
4	<i>KSR Int'l Co. v. Teleflex, Inc.</i> ,	
	550 U.S. 398 (2007).....	2, 3, 4
5	<i>L.A. Gear v. Thom McAn Shoe Co.</i> ,	
6	988 F.2d 1117 (Fed. Cir. 1993).....	11, 12
7	<i>Microsoft Corp. v. i4i Ltd. P'ship</i> ,	
	131 S. Ct. 2238 (2011).....	2, 9
8	<i>Multiform Dessicants, Inc. v. Medzan, Ltd.</i> ,	
9	133 F.3d 1473 (Fed. Cir. 1998).....	7
10	<i>Pacific Coast Marine Windshields Ltd. v. Malibu Boats, LLC</i> ,	
	739 F.3d 694 (Fed. Cir. Jan. 8, 2014)	11
11	<i>Power-one, Inc. v. Artesyn Techs., Inc.</i> ,	
12	599 F.3d 1343 (Fed. Cir. 2010).....	10
13	<i>QBAS Co., Ltd. v. C Walters Intercoastal Corp., No. SACV 10-406</i> ,	
	2010 WL 7785955 (C.D. Cal. Dec. 16, 2010)	2
14	<i>Richardson v. Stanley Works, Inc.</i> ,	
15	597 F.3d 1288 (Fed. Cir. 2010).....	12
16	<i>Ruiz v. A.B. Chance Co.</i> ,	
	234 F.3d 654 (Fed. Cir. 2000).....	2
17	<i>Saffron v. Johnson & Johnson</i> ,	
18	712 F.3d 549 (Fed. Cir. 2013).....	7
19	<i>Scholle Corp. v. Blackhawk Molding Co., Inc.</i> ,	
	133 F.3d 1469 (Fed. Cir. 1998).....	13
20	<i>Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.</i> ,	
21	655 F.3d 1375 (Fed. Cir. 2011).....	2
22	<i>Sun Hill Indus. Inc., v. Easter Unlimited, Inc.</i> ,	
	48 F.3d 1193 (Fed. Cir. 1995).....	12
23	<i>Superguide Corp. v. DirecTV Enters., Inc.</i> ,	
24	358 F.3d 870 (Fed. Cir. 2004).....	7
25	<i>Vas-Cath, Inc. v. Mahurkar</i> ,	
	935 F.2d 1555 (Fed. Cir. 1991).....	6
26	<i>Windsurfing Int'l Inc. v. AMF, Inc.</i> ,	
27	782 F.2d 995 (Fed. Cir. 1986).....	15

Statutes

35 U.S.C. 102(a)(1)..... 10

35 U.S.C. § 112..... 5

Fed. R. Evid. 401, 402, 403, 702 1

I. INTRODUCTION¹

Typo's Opposition ignores two critical underpinnings of BlackBerry's motion that compel a preliminary injunction: (1) Typo's knock-off keyboard intentionally copies critical technical and ornamental design elements disclosed in BlackBerry's '964 and D'775 patents; and (2) Typo's core business model is based on converting BlackBerry users by transplanting BlackBerry's iconic keyboard onto the iPhone. Unable to address BlackBerry's clear factual and legal showing of likelihood of success, Typo completely fails to meet its burden. Typo could not raise any substantial issue with regard to validity of BlackBerry's patents because it did not satisfy obviousness and anticipation standards it recites, nor could it rebut BlackBerry's strong secondary indicia of non-obviousness. Typo's non-infringement positions misconstrue the asserted claims and conducting inappropriate infringement analyses. Finally, BlackBerry's most powerful evidence of Typo's irreparable harm to BlackBerry's customer relationships and goodwill stands unrefuted. This Court should issue a preliminary injunction immediately to prevent further injury to BlackBerry from Typo's blatant theft of BlackBerry's patented keyboard technology and design.

II. TYPO RAISES NO SUBSTANTIAL ISSUE OF INVALIDITY OF THE '964 PATENT

To defeat this motion, Typo must prove it is likely to prevail when the evidence is "view[ed] . . . in light of the burdens and presumptions that will inhere at trial," including the presumption of validity and clear and convincing evidence standard. *Canon Computer Sys., Inc. v. Nu-Kote Int'l, Inc.*, 134 F.3d 1085, 1088 (Fed. Cir. 2001) (without "persuasive evidence of invalidity, the very existence of the patent satisfies the patentee's burden on the validity issue"). Typo failed to identify any persuasive evidence of invalidity, much less clear and convincing evidence. Typo concedes the '964 patent is novel by not naming a single anticipatory reference. Its only arguments—obviousness and indefiniteness—fall short.

¹ Typo founder Laurence Hallier's declaration is rife with arguments and opinions even though he is neither qualified nor offered as an expert witness. Mr. Hallier says he is a "serial entrepreneur" with advertising experience, but he has no legal or technical training. Hallier Dec. ("Hallier"), Dkt. 25-22. Thus, the Court should strike ¶¶10, 13-29, 37-38, 40-41, & 44-53. *See* Fed. R. Evid. 401, 402, 403, 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Typo also circumvented the Court's page limits by jamming his declaration with these improper arguments, as well as assertions and exhibits not relied upon in its brief. On this basis, the Court should strike ¶¶1-5, 9-29, 37-42, 44-43; & Exs. 13-17. *See, e.g., Apple, Inc. v. Samsung Electronics Co., Ltd.*, No. 11-CV-01846-LHK, Dkt. 2212 (N.D. Cal. Jan. 2, 2013) (striking arguments in declarations but not articulated within the briefing page limits).

A. The ‘964 Patent Is Not Obvious

To prevail on obviousness, Typo must prove that “the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.” *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 406 (2007). This burden is heavier because Typo cites art considered during prosecution. *See Microsoft Corp. v. i4i Ltd. P’ship*, 131 S.Ct. 2238, 2251 (2011). In an obviousness determination, one must consider “(1) the scope and content of the prior art, (2) the differences between the prior art and the claimed invention at the time of invention, (3) the level of ordinary skill in the art, and (4) the objective indicia of nonobviousness.” *Eli Lilly and Co. v. Zenith Goldline Pharm., Inc.*, 471 F.3d 1369, 1377 (Fed. Cir. 2006). The scope is not just any art, but art that is “reasonably pertinent to the particular problem with which the invention was involved.” *Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 664 (Fed. Cir. 2000). Obviousness requires an “explicit” rationale as to why one of ordinary skill in the art would have “combine[d] the known elements in the fashion claimed by the patent at issue.” *KSR*, 550 U.S. at 418-19. Using hindsight in the obviousness analysis is forbidden. *Id.* at 421. Importantly, secondary considerations may often be the most “probative and cogent evidence [of nonobviousness] in the record.” *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 655 F.3d 1375, 1364 (Fed. Cir. 2011) (citations omitted).

Typo’s Arguments Ignore the Problem Addressed by the Invention. The new prior art on which Typo relies (Opp. at 3-5) was not pertinent to the problem faced by the inventors of the ‘964 patent, and thus, not surprisingly, was not raised during prosecution.² To the extent those devices are pertinent, they are cumulative of art considered during prosecution. Rempel Reply Dec. (“Rempel”) ¶¶99-119.

The ‘964 patent is directed to handheld devices for electronic communication. The specification explains that “[i]n order to keep the form factor of the two-way pager small enough to be worn on the body of the user . . . the input device needs to be small, have a minimal number of keys and optimized for use with a minimal number of key strokes.” Dkt. 1-1 at Col. 1:30-37. To solve this problem, the ‘964

² Typo’s assertion that BlackBerry “completely ignore[d] the prior art” in its opening brief (Opp. at 6) disregards the legal standard and practice in preliminary injunction in a patent case. It is the *accused infringer’s* obligation to identify prior art in its opposition to a motion for preliminary injunction (to the extent relevant), to which the patentee responds in its reply. *See QBAS Co., Ltd. v. C Walters Intercoastal Corp.*, No. SACV 10-406, 2010 WL 7785955 at *3-4 (C.D. Cal. Dec. 16, 2010).

1 patent is “directed to an input device that is oriented to be used *substantially through use of the*
 2 *thumbs* . . . by providing a keyboard with a *minimal number of keys [that] are placed* . . . *to maximize*
 3 *the surface area of the thumb hitting the key* and to provide the user with a comfortable position of the
 4 hands for data input.” *Id.* at Col. 1:44-65 (emphasis added). This orientation “encourages input by the
 5 thumbs, which the inventors of the instant invention have discovered to be faster and more accurate in
 6 small hand-held electronic devices than touch-typing or ‘hunting and pecking’ typing.” *Id.*

7 The pertinent art here is small handheld communication devices (Rempel ¶¶26-35, 102-118) and
 8 not, as Typo contends, all QWERTY keyboards, mechanical typewriter keyboards, and the Smith Corona
 9 Spell Mate and Spell Right devices relied on by Typo. *See* Opp. at 4-5; Rempel ¶¶102-118. These
 10 larger form factor devices were not used for electronic communication, nor were they intended for use
 11 with small handheld electronic devices designed to be carried at all times. *See* Curley Dec. (“Curley”),
 12 Dkt. 25-1 ¶¶22-38; Rempel ¶¶102-118. Thus, Typo’s prior art is not pertinent to an obviousness
 13 analysis. Rempel ¶118.

14 **Typo Fails to Identify the Level of Ordinary Skill in the Art or Any Reason to Combine.**

15 Typo never identifies the relevant art to which the ‘964 patent pertains, much less the level of ordinary
 16 skill in the art; yet both are necessary to prove obviousness, regardless of the burden of proof applied.
 17 *See Eli Lilly*, 471 F.3d at 1377. Critically, Typo provides no rationale as to why one of ordinary skill in
 18 the art would have combined the elements of *any* of the prior art it identifies. Rather, Typo only makes
 19 conclusory assertions about the art and its combinations. *See, e.g.,* Opp. at 5. This analysis is deficient
 20 as a matter of law, which requires an “explicit” statement of why one of ordinary skill in the art would
 21 have combined the references. *See KSR*, 550 U.S. at 418-19. Typo has presented no evidence
 22 suggesting that a skilled artisan would have solved the problem of facilitating thumb typing in a handheld
 23 communication device in the manner the ‘964 patent did. Rempel ¶¶120-165.

24 On the contrary, one of ordinary skill in the art would not have been motivated to combine the
 25 references identified by Typo to arrive at the claimed invention. *Id.* With respect to the proposed
 26 combination of the Spell Right or Spell Mate devices and either Siitonen (or a traditional QWERTY
 27 keyboard), neither the Spell Right or Spell Mate are mobile communication devices, and they were not
 28 limited in surface space in the same way as the devices that are the subject of the ‘964 patent. *Id.* at

¶¶147-151. The Spell Right and Spell Mate were also not intended for communicating in sentences, but were instead designed for typing individual words or equations on a larger form factor device (*e.g.*, 5” x 7” or larger). *Id.* One would not combine the Spell Right or Spell Mate, which have additional directional keys for navigating the user interface, with Siitonen or a traditional QWERTY keyboard because the combination would require drastic changes affecting functionality. *Id.* at ¶¶152-57. For example, replacing the bottom row of keys on the Spell Right or Spell Mate with that of Siitonen would require moving some of the directional keys, thus separating the up/down and left/right arrows. *Id.* at ¶¶152-55. Moreover, combining devices with relatively large form factors (electronic dictionary or thesaurus) and smaller form factors (Siitonen smartphone) would not yield predictable results because their different uses and purposes dictate different ergonomic functions and designs. *Id.* at ¶157. Only improper hindsight knowledge serves to guide Typo in making these combinations. *See KSR*, 550 U.S. at 421.

Typo Fails To Identify All of the Claim Elements In The Art. Typo argues that the combinations it proposes would meet all of the elements of the asserted claims. *Opp.* at 5-6. But Typo’s flawed analysis is merely conclusory, and improperly focuses on what it calls the “essence of claim 19.” *Opp.* at 6. Typo does not even include a mapping of claim elements to the art. *Id.* at 5-6. Moreover, Typo ignores certain key limitations altogether. The lowest rows of the Siitonen keyboard and a traditional QWERTY keyboard both include keys that are horizontally offset from other keys above. *Rempel* ¶156. And neither the Siitonen keyboard nor the Smith-Corona devices include letter keys that are adjacent to the right and left edges of the device as required by the claims. *Id.* at ¶¶128-137. As a result, the proposed combinations would result in (1) a lower row of offset keys that are not “substantially vertically aligned” with those in the rows above; (2) with keys in the upper, middle, and lower rows that are not “bisected by a vertical reference substantially midway between the left edge and the right edge”; and (3) with keys in rows that are not “adjacent” to the left and right edges. *Id.* at ¶156. These are all requirements of the asserted claims, and each is missing from Typo’s prior art combinations.

Typo Fails to Rebut the Strong Objective Evidence of Non-Obviousness. BlackBerry has identified convincing evidence of five factors of secondary indicia of non-obviousness. *Mot.* at 18-19. Tellingly, Typo does not contest at least three of these factors—namely, industry acceptance, long-felt but unresolved need and Typo’s own transparent effort to copy the BlackBerry keyboard design, which

embodies the ‘964 patent. *Id.* at 19. Typo’s arguments on secondary indicia bear no relationship to the factors in *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). First, Typo claims that the “commercial success” and “praise by others” BlackBerry has achieved is “not over the Rim 850/950 Wireless Handheld Device.” Opp. at 7. Not only is this incorrect factually (Rempel ¶164; Rempel Opening Dec., Dkt. 11-7 ¶122), but the commercial success of, and praise by others for, subsequent BlackBerry devices (such as the Bold) is directly relevant and connected to the ‘964 patent because those subsequent BlackBerry products practice the ‘964 patent. *See* Rempel Opening Dec. ¶¶103-15.

Furthermore, Typo’s unsupported assertion that “no one in the industry pays any mind to the ‘964 patent when designing keyboards for cell phones” is speculative and irrelevant. Opp. at 7. To the extent Typo claims numerous manufacturers also practice the ‘964 patent, this argument is not only conclusory and entitled to little weight, but if true is also evidence of copying by others, which further supports non-obviousness. *See Graham*, 383 U.S. at 17-18;³ Mot. at 18.

B. The ‘964 Patent is Not Invalid Under 35 U.S.C. § 112

In arguing invalidity under section 112, Typo ignores the clear disclosure of the drawings and the plain claim language. First, Typo incorrectly argues that the ‘964 patent lacks sufficient written description for a “device housing . . . being bisected by a vertical reference substantially midway between the left edge and the right edge.” Opp. at 8. This phrase, which was added during prosecution, did not come “out of left field” as Typo suggests (*id.*); there is ample support in the patent drawings for this phrase. Rempel ¶¶166-171. From this premise, Typo incorrectly argues that there is no “discussion or support for how elements are positioned relative to the edges of the housing.” Opp. at 9. Typo, however, ignores its own cited case law, which holds that drawings alone can provide the written description of the invention, because the figures show an embodiment that clearly discloses a “device housing . . . being bisected by a vertical reference substantially midway between the left edge and the right edge.” Rempel ¶168; *see Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1564 (Fed. Cir. 1991).⁴

³ The Motorola litigation involved three patent applications that are related to the ‘964 patent by family and have the same disclosure as the ‘964 patent. The prior art identified in the Motorola litigation and provided to the PTO during prosecution of this family of patents relates to handheld communication devices and is thus far more pertinent to the ‘964 inventions than the art now cited by Typo.

⁴ The other law cited by Typo (Opp. at 8-9) simply recites the general standards for written description, but is otherwise inapposite and distinguishable. Typo has made no attempt to identify

Figure 2, for example, inherently discloses the vertical reference midway between the left and right edges. *Cf. Bose Corp. v. JBL, Inc.*, 274 F.3d 1354, 1359 (Fed. Cir. 2001) (recitation of “an ellipse” provided antecedent basis for “an ellipse having a major diameter” because “[t]here can be no dispute that mathematically an inherent characteristic of an ellipse is a major diameter”). The keys are arranged in such a way to disclose to one of ordinary skill a virtual (if not actual) vertical reference, that is expressly shown in Figure 3. Rempel ¶¶169-170. The specification provides adequate written description for the claims, and even if it did not, the drawings do.⁵

Typo’s argument that the asserted claims allegedly lack an antecedent basis for the term “vertical reference line” (Opp. at 10-11) is also specious. If the scope of a claim is reasonably ascertainable by those skilled in the art, then the claim is not indefinite. *See Energizer Holdings Inc. v. Int’l Trade Comm’n*, 435 F.3d 1366, 1370-71 (Fed. Cir. 2006) (noting “anode gel” provided antecedent basis for “zinc anode”). The term “a vertical reference” is used in the preamble. Typo’s only argument is that the term “vertical reference line” in the last limitation could mean “something else,” without articulating what else it could mean. Opp. at 11. Here, one of ordinary skill reading claim 19 would understand that the term “vertical reference line” refers to the same vertical reference in the preamble and is the same as the “vertical reference” used throughout the claim to describe the arrangement of keys in the upper, middle and lower rows. Rempel ¶¶172-180. There is no ambiguity here, much less any ambiguity that would prevent one of ordinary skill from ascertaining the claim’s scope.

III. THE ACCUSED TYPO KEYBOARD INFRINGES THE ‘964 PATENT

Typo argues that only two claim terms—“device” and “bisected by a vertical reference”—require the Court’s construction. In doing so, Typo concedes that the remainder of the claim terms do not need construction. Opp. at 11-17. These two terms singled out by Typo are easily understood and do not require construction. Typo’s reliance on *Multiform Dessicants, Inc. v. Medzan, Ltd.*, 133 F.3d 1473, 1476 (Fed. Cir. 1998) and *Saffron v. Johnson & Johnson*, 712 F.3d 549, 558-61 (Fed. Cir. 2013) to support its position is misplaced. In *Multiform*, the Court merely noted that “technical terms” or “words

similarities between the outcomes of those cases and the facts here because there are none.

⁵ Typo argues that the asserted claims do not benefit from priority to 1998 because of the alleged inadequate written description. Because the written description is adequate, Typo’s argument fails. Rempel ¶¶166-171.

of art or special usages” can be construed as part of claim construction. 133 F.3d at 1476. In *Saffron*, the Court construed the term “device” based on a specific “prosecution disclaimer” that constituted “an affirmative definition for the disputed term.” 712 F.3d at 559. No special definition or prosecution disclaimer exists here.

A. Typo’s Proposed Constructions Are Incorrect

Typo’s construction of “device” to mean “messaging device” (Opp. at 13) is unnecessary, and unsupported by the language of the ’964 patent claims. Claim 19 claims “[a] keyboard *for use with* a mobile communication device, the keyboard configured in a device housing....”⁶ The keyboard *itself* need not be in a mobile communication (or messaging) device housing. Moreover, when Typo’s proposed construction is used, it introduces a redundancy the patentee clearly did not intend. Indeed, the ’964 patent already claims (in, *e.g.*, Claims 1-4) a “messaging device,” indicating that the patentee specifically chose not to use the term in claim 19. Rempel ¶¶36-67. Typo’s attempt to read the limitation “messaging” into the term “device” from the specification is improper. *See Superguide Corp. v. DirecTV Enters., Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004).

Typo construes “bisected by a vertical reference” to mean “a distinct physical vertical aspect that physically divides approximately half of the keys positioned to the left and approximately half the keys positioned to the right.” Opp. at 13. This fares no better because it imports limitations (*e.g.*, “distinct,” “physical,” and “physically divides”) unsupported by any intrinsic or extrinsic evidence. *Superguide*, 358 F.3d at 875. Typo’s expert in fact concedes that a reference is “merely a descriptive construct for a location,” and it is “*not any actual physical aspect of the device.*” Wobbrock Dec. (“Wobbrock”), Dkt. 25-13 ¶35 (emphasis added). The evidence cited by Typo (Opp. at 13-14) never uses the term “physical” or “physically,” much less discloses or requires a *physical* line that serves as a vertical reference. Rempel ¶¶68-88. As noted above, Figures 2 and 3 support a virtual reference line used to show the relative placement of the keys. *See* Figs. 2-3; Col. 4:63-64. Nothing in those Figures requires a “physical aspect”—whatever that may mean—for a vertical reference. Indeed, during prosecution the Applicants themselves added “a vertical line” down the center of the Sittonen device to show this vertical

⁶ Typo repeatedly misstates the claim language. Opp. at 11, 15, 16. The claims merely require a keyboard “*for use with* a mobile communication device,” not the device itself. It is undisputed that Typo’s keyboard is sold for use with a mobile communication device—the Apple iPhone.

reference. Rempel ¶¶82-83.

Accordingly, one of ordinary skill in the art would understand that the term “vertical reference” in claim 19 simply refers to a reference (whether virtual or real) used to describe in the claim where keys should be placed on the housing’s top surface. *Id.* at ¶87. The rest of the claim makes clear that this particular “reference” is substantially midway between the left and right edges of the housing. *Id.* at ¶¶68-88. Typo’s construction should therefore be rejected.

B. Even Under Typo’s Proposed Constructions, the Typo Keyboard Infringes

The Typo product includes a “keyboard for use with a mobile communication messaging device.” Indeed, it is a case sold for use as a device housing for a messaging device—the Apple iPhone. Rempel ¶¶89-92. The Typo keyboard product is configured in a device housing that is bisected by “a distinct physical vertical aspect that physically divides approximately half of the keys positioned to the left and approximately half the keys positioned to the right.” Under Typo’s flawed interpretation, the “vertical



reference” is met by the physical line created by the separation between keys at the center of the Typo Keyboard, and it infringes. *Id.* at ¶¶93-98.

IV. TYPO RAISES NO SUBSTANTIAL ISSUE OF INVALIDITY OF THE D’775 PATENT

Typo has failed to analyze anticipation and obviousness of the D’775 design patent properly, let alone raise a substantial issue as to invalidity under the standards cited by Typo and discussed above. The D’775 patent must be presumed valid for purposes of this motion.

A. The D’775 Patent Is Not Anticipated

Typo makes a short, conclusory argument that the D’775 patent is anticipated but offers no admissible evidence of anticipation consistent with the applicable standard. Typo acknowledges that the same ordinary observer test for design infringement applies to anticipation, meaning that a design patent is not anticipated unless it is substantially similar to a single prior art reference, “such as to deceive [an ordinary observer], inducing him to purchase one supposing it to be the other.” *Opp.* at 17-18 (citing *Int’l Seaway Trading Corp.*, 589 F.3d 1233, 1240-41 (Fed. Cir. 2009)). Claiming the D’775 is anticipated by “numerous prior art designs,” Typo names just one, the “BlackBerry Bold design.” *Opp.* at 17. Even then, neither Typo nor its expert attempts to establish an ordinary observer would believe

1 the BlackBerry Bold design was the same as the D’775 design, but instead merely concluded that “the
 2 D’775 patent (or the Q10) resembles the BlackBerry Bold far more than it resembles the Typo
 3 Keyboard . . . [and] is accordingly anticipated.” Opp. at 18; Wobbrock ¶¶51; Lucente Reply Dec.
 4 (“Lucente”) ¶¶6, 13, 25).

5 Significantly, when the PTO examined the D’775 application, it considered United States Patent
 6 D’565,578, which is the design for the BlackBerry Bold cited by Typo, and the D’775 patent *issued over*
 7 *D’578 without amendment*. Examiner’s Comment attached to the Notice of Allowability, Dkt. 25-59
 8 at 6, 25-60 at 1; Lucente ¶28. The clear and convincing standard is even more difficult to meet if the
 9 asserted prior art was examined by the PTO and the patent issued over that art. *Microsoft*, 131 S.Ct. at
 10 2249-51. Even aside from these fatal legal problems, there is no good faith argument that an ordinary
 11 observer familiar with the prior art would be deceived into thinking the D’775 patent is the *same* design
 12 as the D’578 patent or the BlackBerry Bold device. *Int’l Seaway*, 589 F.3d at 1240-41. A simple visual
 13 comparison of the three designs confirms that they are not deceptively similar. Lucente ¶28. Thus,
 14 Typo failed to meet its heavy burden to provide clear and convincing evidence of anticipation.

15 **B. The D’775 Is Not Obvious**

16 To establish obviousness for a design patent, an infringer must identify specific pieces of prior art
 17 that when combined can create a single anticipating reference, and must show that it would have been
 18 obvious to a designer skilled in the art to make this combination or modification. The first step is to
 19 identify a single prior art reference that can serve as a primary reference in the eyes of a person of
 20 ordinary skill in the art. *Int’l Seaway*, 589 F.3d at 1240. To serve as a primary obviousness reference,
 21 the design characteristics of the prior art must be “*basically the same* as the claimed design.” *Durling v.*
 22 *Spectrum Furniture Co., Inc.*, 101 F.3d 100, 103 (Fed. Cir. 1996) (emphasis added); *see In re Harvey*, 12
 23 F.3d 1061, 1063 (Fed. Cir. 1993) (where major modifications would be required, the prior reference
 24 “cannot qualify as a basic design”). If a primary reference is identified, “secondary references may only
 25 be used to modify the primary reference if they are so related [to the primary reference] that the
 26 appearance of certain ornamental features in one would suggest the application of those features to the
 27 other.” *Durling*, 101 F.3d at 103 (quotation omitted). “Once that piece of prior art has been constructed,
 28 obviousness, like anticipation, requires application of the ordinary observer test.” *Int’l Seaway*, 589 F.3d

1 at 1240-1241.

2 Typo's Opposition simply does not contain an obviousness analysis. Opp. at 17-18; Lucente ¶¶6,
 3 12, 14-20. Typo offered no evidence whatsoever that any of the vaguely referenced devices it calls
 4 "prior art" were "in public use, on sale, or otherwise available to the public" before the D'775 priority
 5 date as required by 35 USC 102(a)(1). Typo and its purported expert fail to identify or analyze any prior
 6 art as a primary or secondary reference, and further fails to indicate how any prior art references would
 7 be combined to be deceptively similar to the D'775 patent. .Opp. at 17-18; Wobbrock ¶¶50-51.
 8 Although his Exhibit 2 is a "set of photos for some of the phones" that he reviewed, Mr. Wobbrock does
 9 not articulate what references he believes are prior art. Wobbrock ¶¶50-51.⁷ Indeed, Mr. Wobbrock
 10 fails even to include, let alone analyze, any views of the supposed prior art other than the front view, in
 11 direct violation of Federal Circuit law requiring that all views be considered. *Contessa*, 282 F.3d at
 12 1381-1382; *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 678 F.3d 1314, 1326 (Fed. Cir. 2012) (holding it was
 13 erroneous for district court to refuse to consider all views of prior art). Typo's Opposition fails to
 14 provide the requisite explanation why a designer skilled in the art would consider it obvious to combine
 15 any references, and fails to apply the ordinary observer standard against any combination at all. Opp. at
 16 17-18; Wobbrock at ¶¶50-51; Lucente ¶¶6, 12, 14-23.

17 Typo tries to distract from a lack of evidence of obviousness by misleadingly suggesting that the
 18 D'775 patent is invalid because BlackBerry uses legacy design elements. Opp. at 18. Even if all the
 19 various individual design elements of the D'775 were shown to be in the prior art and BlackBerry's prior
 20 designs -- which they are not -- this alone cannot establish invalidity. Novel designs can be created
 21 using elements already known in the art. *Power-one, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343 (Fed.
 22 Cir. 2010) ("a patent composed of several elements is not proved obvious merely by demonstrating that
 23 each of its elements was, independently, known in the prior art") (internal quotation and citation omitted).

24 Finally, Typo's Opposition does not address any of the secondary indicia of nonobviousness
 25 identified in BlackBerry's Motion. Mot. at 13-14. Typo's Opposition does not dispute that the Typo
 26 Keyboard is an intentional copy of the D'775 and the BlackBerry Q10, or that the BlackBerry Q10

27 ⁷ Typo also relies on Mr. Hallier's declaration to argue that the D'775 patent is "far from new or
 28 original." Opp. at 18. As discussed above, Mr. Hallier is an investor with an advertising background
 and no technical expertise, so his purported opinions on validity should be excluded or disregarded.

1 keyboard has received significant industry praise. These secondary indicia confirm that the D’775
 2 patented design is not obvious. Lucente Opening Dec., Dkt. 12-5 ¶¶ 68-70; Lucente ¶29. In short,
 3 Typo utterly failed to meet its obligation to put forth persuasive evidence that the D’775 patent is obvious.
 4 *L.A. Gear v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1123 (Fed. Cir. 1993).

5 **V. THE ACCUSED TYPO KEYBOARD INFRINGES THE D’775 PATENT**

6 **A. Typo’s Proposed Verbal Claim Construction is Improper**

7 A court generally should not attempt to construe a design patent claim by providing a “detailed
 8 verbal description” because a design “is better represented by an illustration ‘than it could be by any
 9 description.’” *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679 (Fed. Cir. 2008). Typo both
 10 seeks a verbal construction and attempts to impose improper “prosecution history...limitations” on the
 11 D’775 patent. Opp. at 19-20. Prosecution history estoppel cannot apply because BlackBerry did not
 12 surrender any part of its claim as a condition for securing the patent. *See Pacific Coast Marine*
 13 *Windshields Ltd. v. Malibu Boats, LLC*, 739 F.3d 694, 701-702, (Fed. Cir. Jan. 8, 2014). The patent
 14 examiner identified a partial list of novel design elements, and issued D’775 over the cited prior art as
 15 claimed, without modification or amendment. D’775 File Wrapper, Dkts. 25-59 at 6, 25-60 at 1. The
 16 Typo Keyboard should therefore be compared to the D’775 patent images themselves, without a verbal
 17 claim construction, using the proper ordinary observer analysis. *Egyptian Goddess*, 543 F.3d at 676-77.

18 **B. No Elements of the D’775 Patent Are Dictated by Function**

19 Although Typo alleges that the “shape, angle and position of the keys and the frets” in the D’775
 20 design are functional, (Opp. at 20-21), Mr. Wobbrock only claimed the frets and the “sculpted keys” are
 21 functional because they can improve thumb typing. Wobbrock ¶¶58-69. Design patents protect the
 22 ornamental design of articles of manufacture, so it is fundamental that a design or individual element
 23 cannot be found to be “functional” simply because it serves a functional purpose. *L.A. Gear*, 988 F.2d at
 24 1123. Instead, the Court may only factor out elements whose designs are “dictated by their functional
 25 purpose,” *see, e.g., Richardson v. Stanley Works, Inc.*, 597 F.3d 1288, 1294 (Fed. Cir. 2010), which was
 26 Typo’s burden to prove. *See L.A. Gear*, 988 F.2d at 1123. Typo does not mention, let alone attempt to
 27 meet, the standard for proving functionality. Opp. at 20-21. Typo merely states the obvious fact that
 28 the D’775 patent claims the ornamental design of a keyboard – a functional object – and argues that “in

its own advertising, BlackBerry touts the functionality of its keyboard.” *Id.* Despite Typo’s attempt to skirt the governing law, the D’775 design elements are not functional just because they are “useful,” particularly in light of the evidence BlackBerry propounded that the keys and frets of its keyboards are designed to have a unique aesthetic appearance. Mot. at 4, 11; Lucente ¶¶30-35; Hofer ¶¶7, 11-12. Furthermore, Typo’s own identification of numerous alternative designs and other admissions serve to prove that no elements of the D’775 patent are “dictated by function.” Lucente ¶¶34-36; *see Best Lock Corp. v. Ilco Unican Corp.*, 94 F.3d 1563, 1566 (Fed. Cir. 1996) (“A design is not dictated solely by its function when alternative designs for the article of manufacture are available.”) Typo’s conclusory assertions untied to the applicable standards and governing law must fail.

C. BlackBerry Has Proven Infringement of the D’775 Patent

Recognizing that a proper comparison of the D’775 design and the accused Typo Keyboard would be devastating to its position, Typo compares a shrunken image of a Typo keyboard case inside packaging compared to a blown-up excerpt of the patented design. Opp. at 21; *see* Lucente ¶41. That choice speaks volumes about the starkness of Typo’s intentional infringement when the correct infringement comparison and analysis is utilized, as BlackBerry demonstrated in its moving papers. *Id.*; Mot. at 11-13; Lucente Opening Dec. ¶¶50-78; *see also Contessa Food Prods., Inc. v. Conagra*, 282 F.3d 1370, 1381-82 (Fed. Cir. at 2012) (remanding to trial court to remove packaging from accused device before conducting infringement analysis); *Sun Hill Indus. Inc., v. Easter Unlimited, Inc.*, 48 F.3d 1193, 1196-97 (Fed. Cir. 1995), *abrogated on other grounds by Egyptian Goddess*, 543 F.3d 665 (error to consider difference in size in assessing infringement when design patents not limited by size)).

As Typo itself stated, the Federal Circuit has warned against “assigning exaggerated importance to small differences between the claimed and accused designs.” Opp. at 19 (quoting and citing *Egyptian Goddess*, 543 F.3d at 678). Furthermore, Typo’s \$99 price point—lauded by Typo as a reason consumers would not be confused (Opp. at 1)—indicates that the ordinary purchaser would be *more* likely to be deceived, because she is likely to pay less attention in purchasing an inexpensive case than a smartphone. Lucente ¶42; *see Braun*, 975 F.2d 815, 820, fn. 9 (Fed. Cir. 815). Despite these admissions, Typo fails to address BlackBerry’s contention that the ordinary observer would conclude that the accused Typo Keyboard is deceptively similar to the D’775 patent upon performing a visual

comparison of the accused and claimed designs, and instead highlights minor differences that are insignificant, irrelevant, and inaccurate. Lucente ¶¶37-50. Although Typo provides the Court with no comparisons of any prior art next to the accused Typo Keyboard and the D’775 patent, a review of the “prior art” identified by Typo nonetheless makes clear that the Typo Keyboard is far more similar to the D’775 patent than to any of the references identified by Typo. Lucente ¶51. Nothing in Typo’s Opposition undermines BlackBerry’s clear likelihood of success on the merits regarding infringement. *See* Lucente 4-5, 7, 9-11.⁸

VI. AN IMMEDIATE INJUNCTION IS NEEDED TO PREVENT IRREPARABLE HARM

A. Typo Failed to Rebut BlackBerry’s Evidence Of Irreparable Harm

Typo does not address most of BlackBerry’s arguments for irreparable harm. For example, Typo does not contest that its business model is predicated on persuading BlackBerry users to buy a Typo Keyboard to add onto an iPhone instead. There is no denying that fact because Typo advertises that its keyboard was developed to make it possible for users to get rid of their BlackBerries, aka phones “for typing.” Lynch Opening Dec. Ex. 4, Dkt. 13-4, at 20. Nor does Typo’s Opposition contest that it directly and intentionally copied the keyboard design of the BlackBerry Q10, including BlackBerry’s distinctive design features. Nor can it, given that the Typo Keyboard is nearly identical to the D’775 patent and BlackBerry Q10 keyboard. Lucente ¶4. Typo does not disagree that this deceptively similar appearance creates the impression that BlackBerry approves of the Typo Keyboard. And it does not dispute that many reviews have described the Typo Keyboard as an inferior version of a BlackBerry keyboard, or contest that this perception will harm BlackBerry’s relationship with its customers. This last un rebutted fact itself constitutes irreparable harm. *See Clamp-Swing Pricing Co. v. Super Market Merchandising and Supply, Inc.*, No. 13-cv-04515-WHO, 2013 WL 6199155, at *4 (N.D. Cal. Nov. 21, 2013) (“inferior quality of an infringing product can constitute irreparable harm”).

⁸ Typo’s equitable estoppel argument based on BlackBerry’s purported failure to sue third parties is contrary to the law and must fail. Opp. at 22. Estoppel can only lie when plaintiff failed to take action against defendant and defendant continued its conduct in detrimental reliance. *See, e.g., Scholle Corp. v. Blackhawk Molding Co., Inc.*, 133 F.3d 1469 (Fed. Cir. 1998). The cited case of *Electromotive Div. of Gen. Motors Corp. v. Transp. Sys. Div. of Gen. Elec. Co.*, 275 F. Supp. 2d 850, 852-55 (E.D. Mich. 2003), is distinguishable because Typo and BlackBerry never had prior dealings. Finally, any claimed reliance by Typo would be unreasonable because it is predicated on the unsubstantiated and inaccurate claim that all the third party devices cited in its opposition infringe BlackBerry’s patents. Opp. at 22-23.

Nor does Typo dispute that BlackBerry has invested very significant resources in developing, advertising, and marketing its iconic keyboard, that consumers associate the iconic keyboard design with BlackBerry, or that BlackBerry's keyboard is one of the primary sales drivers. Typo sets up a straw man by arguing that BlackBerry's recent device sales indicate that it has not accumulated public goodwill, but does not refute the widespread acclaim for BlackBerry's iconic keyboard and the importance of BlackBerry's keyboard to its customer base. Opp. at 24. Typo also fails to address the detrimental impact on Blackberry resulting from each sale lost to a competing product.

Typo's hollow claims that BlackBerry will not lose sales because and the parties allegedly sell in different channels to different customers are absurd, untrue, and entitled to no weight. Opp. at 24-25. Typo tries to leverage a single statement by BlackBerry CEO John Chen into abandonment of consumer business. This isolated, out of context statement cannot meet Typo's burden of refuting BlackBerry's evidence of irreparable harm, and Mr. Chen has made clear that Typo's speculation is erroneous:

And central to our productivity focus is our keyboard. BlackBerry has invested years of research and development to create the world's best mobile keyboard, and that will continue to be a central focus for us. . . . One critical challenge we have been addressing is the company's broad approach on both enterprise and consumer markets. . . . [This] doesn't mean we are turning our back on the consumer--far from it

Lynch Reply Dec. ("Lynch") Ex. 1. Typo says it is directed to consumers, but it advertises its product as an "indispensible business tool" and shows only businessmen, including Typo counsel Mr. Taillieu, as its typical customers. Lynch Opening Dec. Ex. 4 at 20-23.⁹

Finally, Typo disingenuously attempts to deny the harmful effect of sales of the Typo Keyboard on BlackBerry by arguing that purchasers of the Typo Keyboard are iPhone owners. Opp. at 24-25. Typo does not *refute* irreparable harm, it *admits* it. Typo's own advertising copy states that the Typo Keyboard is intended to allow users who own an iPhone and a phone "for typing" to drop the latter and use only an iPhone supplemented by a Typo Keyboard. Lynch Opening Dec. Ex. 4 at 20. By selling its infringing knock-off keyboard, Typo also makes it possible for loyal BlackBerry users who want a

⁹ Typo also mischaracterizes the intent of a press release quoting BlackBerry's general counsel, (Opp at 25-26), and conspicuously omits the very next statement: "The Typo Keyboard violates BlackBerry's intellectual property rights, and BlackBerry will protect those rights from blatant copying and infringement. BlackBerry's iconic physical keyboard designs have been recognized by the press and the public as a significant market differentiator for its mobile handheld devices." Lynch Ex. 2. This does not counter BlackBerry's strong showing of irreparable harm in support of its motion.

1 physical keyboard to switch to an iPhone. That the user purchases the iPhone itself from Apple does not
 2 mitigate Typo's critical role in enabling the lost sale. BlackBerry's evidence about the long-term harm
 3 caused by each such loss of a BlackBerry customer is unrefuted. Douglas Dec., Dkt. 11-6 ¶¶27-37.

4 BlackBerry's efforts to preserve its customer base are threatened by knock-off products like the
 5 Typo Keyboard and its express goal to eliminate a BlackBerry user with each and every sale Typo makes.
 6 The harm Typo is inflicting on BlackBerry could not be any more irreparable and must be stopped.

7 **B. The Balance of Equities Favors BlackBerry**

8 This Court should not give any weight to Typo's internally inconsistent characterizations of
 9 BlackBerry's success, or lack thereof. Opp. at 26. Typo's arguments that its business would be
 10 damaged by a preliminary injunction are unavailing, and would amount to a rule barring a business from
 11 obtaining a preliminary injunction against a wrongful competitor. "One who elects to build a business
 12 on a product found to infringe cannot be heard to complain if an injunction against continuing
 13 infringement destroys the business so elected." *Windsurfing Int'l Inc. v. AMF, Inc.*, 782 F.2d 995, 1003
 14 n.12 (Fed. Cir. 1986); *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1069 (N.D. Cal. 2000);
 15 *see also Cadence Design Sys., Inc. v. Avant Corp.*, 125 F.3d 824, 830 (9th Cir. 1997) (reversible error for
 16 a district court to even consider 'the fact that an injunction would be devastating to [defendant's]
 17 business once the plaintiff has made a strong showing of likely success on the merits of a copyright
 18 infringement case'). The balance of harms weighs firmly in favor of BlackBerry and against Typo,
 19 which chose to put a knock-off BlackBerry keyboard on its first and only product.

20 **C. A Preliminary Injunction Serves the Public Interest**

21 The public's interest in using a Typo Keyboard is minimal, particularly given the availability of
 22 alternative add-on keyboards. *E.g.*, Lucente Opening Dec. ¶¶41-43. Any such interest is far
 23 outweighed by the significant public interest in furthering the progress of science by enforcing
 24 BlackBerry's patent rights; an interest so important it is enshrined in Art. 1, Sec. 8 of the Constitution.

25 **VII. CONCLUSION**

26 For the foregoing reasons, BlackBerry respectfully requests that the Court grant BlackBerry's
 27 Motion for a Preliminary Injunction.

1 DATED: February 12, 2014

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

3 By /s/ Kevin P.B. Johnson

4 Kevin P. B. Johnson

5 Attorney for BlackBerry Limited